The Central Law Journal.

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CURRENT TOPICS.

One of the greatest practical difficulties which has been found to stand in the way of the enforcement of Prohibitory Liquor Laws wherever these have existed, is the unwillingness of jurors to convict for a violation of them, (even where the facts in the case admit of no doubt,) and their readiness to face the moral guilt of perjury rather than do so. Recently, in Kansas, a bold, ingenious and novel attempt to dodge this difficulty was made, but without success. The case, which is entitled State, *ex rel.* v. Crawford, is interesting and instructive. The proceeding was instituted in the District Court of Shawnee County, by the county attorney, in the name of the State, for the purpose of perpetually enjoining the further continuance of an illegal liquor saloon, in which intoxicating liquors were illegally, continuously and persistently sold, to be drank on the premises, as a beverage. The extraordinary jurisdiction of the chancellor is invoked on the ground that such a drinking saloon as the one described is a nuisance. This position could not be contested, for it appears that by the Kansas statutes, both before and since the enactment of the prohibitory amendment, a place where the liquor law is persistently violated, is a public nuisance. Laws of Kansas, 1859, p. 555; Laws of 1881, p. 241, sec. 43. But the court says that aside from any provision of the statute, such places are properly considered nuisances, and cites a mass of authority for the proposition that "every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated, is a public nuisance, The reasons urged by the defense against the granting of the injunction in this case are two-fold: 1. The keeping of such a saloon is a criminal offense, and, 2. Another plain and adequate remedy is afforded by the statute. The first of these the court (in spite of the contrary opinion expressed by Chancellor Kent in the case of Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371, 375, *et seq.*), regards as insufficient on the weight of authority and reason.

As to the second ground of defense, the court says: "The next question to be considered is, whether any other adequate remedy than injunction exists for the suppression of such nuisances as illegal drinking saloons. * * * * * Section 13 of the prohibitory act declares that all places where intoxicating liquors are manufactured or sold, or kept for sale, in violation of law, are common nuisances; and provides that the owner or keeper of any one of such places, shall be considered guilty of a criminal offense, and be liable to fine and imprisonment. It may be conceded that thus far the statutes do not furnish any adequate remedy for the suppression of illegal drinking saloons, for they provide only for punishing offenses after they have been committed, and do not provide any direct means of preventing future or anticipated offenses, as an injunction, issued in such a case, would necessarily do. Such a remedy * is often held to be a complete, adequate and sufficient remedy; but sometimes it is held not to be a sufficient remedy. But said section 13 also makes further provisions. It also provides, with reference to every place where intoxicating liquors are manufactured or sold, or kept in violation of law, that 'upon the judgment of any court having jurisdiction, finding such place to be a nuisance under this section, the sheriff, deputy or under sheriff, or the constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place.' Now, is not this a plain and adequate remedy for the prevention of all anticipated violations of the law in keeping an illegal drinking saloon?"

It seems to us that this decision contains a pointed hint to those who, for any reason, are desirous of seeing the Kansas amendment enforced; and inasmuch as it is the law, it is right that it should be enforced. The obstacle presented by the reluctance of juries to convict, may be avoided by simply amending the statute so as to omit the penalties for the sale of liquors and the abatement of illegal saloons, leaving only the statutory declaration that the illegal liquor traffic is a nuisance, thus giving room for the invocation of the extraordinary jurisdiction of a court of equity.

LIMITED PARTNERSHIP.

I.

1. *Introductory.*— Limited partnership is the name that is given to that species of partnership which is termed in the French Code of commerce, partnership *en commandite*. It may be defined briefly as a contract by which a partner designated as a special partner, contributes a certain sum to the firm capital, in return for which he receives an agreed proportion of the profits, but whose name does not appear in the firm's transactions, who has no control or power in the management of its affairs other than advisory, and who is liable for its undertakings only to the extent of his contribution to the capital stock, and no further. This species of partnership, which is wanting entirely in the English system, and is purely the creature of statutory enactment in this country, has been known on the continent of Europe for many centuries. The Mediteranean trade of the Middle Ages was carried on principally by its means. It was regulated in France by the Ordinance of Louis XIV., which has been substantially adopted by the modern Code de Commerce.[1] In this country, we find that it was imported into Louisiana and Florida with the Civil Law which forms the framework of their systems of jurisprudence,[2] and that in all, or very nearly all, the other States, where the English Common Law prevails, it has been naturalized under the name of "Limited Partnership" by statutory enactment.[3] The provisions of these statutes bear a strong family resemblance, and are plainly derived directly from the French Code of Commerce, mentioned above, though in most of the States there are several additional ones (notably those relating to the publication of notice of registration and dissolution, and of any alteration in the terms of the co-partnership), which are evidently suggested by our habits and methods in business.

2. *Outlines of the Statutes.*—Where they differ in many subordinate particulars, these enactments are substantially to the following effect: 1. That such organizations may be formed for the transaction of any mercantile, agricultural, mechanical or manufacturing business, but not for the purpose of banking, insurance, railroad and canal enterprises.[4] 2. Such firms shall consist of *a*, general partners, who shall be liable as general partners now are; and, *b*, special partners, who shall contribute in actual cash payments a specific sum as capital, to the common stock, and who shall not ordinarily be liable for the obligations of the firm beyond the sum so contributed. 3. That the business of such firm shall be exclusively managed by the general partners, that the special partners shall have no power to bind the firm by con ract or otherwise. 4. That upon the formation of such a partnership, the persons composing it shall sign a certificate, setting forth, *a*, the firm name; *b*, the nature of the business intended to be carried on; *c*, the names and residences of the partners, distinguishing general from special; *d*, the amount of capital contributed by each partner to the capital stock; *e*, the period at which such partnership is to commence and terminate. 5. Such certificate shall be acknowledged, and 6, recorded, very much as deeds are acknowledged and recorded. 7. With such certificate shall be filed for record an affidavit of a general partner, that the sum contributed by the special partner has actually been paid in, in cash. 8. A failure to file such certificate or affidavit, 9, or a falsehood contained in either, will make all the partners interested liable as general partners. 10. Notice of the formation of such partner-

[1] Pollock's Essays on Jurisprudence and Ethics, 100.

[2] La. Code, secs. 2810-2822; Florida, McClellan's Dig. L. 1881, p. 797.

[3] Alabama, Code 1876, secs. 2063-2087; California, Civ. Code, secs. 2477 2510, Colorado, Act 1874. p. 200; Gen. Laws 1874, p. 678; Connecticut, Gen. Sts. 1875, p. 364; Delaware, Rev. Code, 358; Georgia, Code 1873, secs. 1920-1943; Illinois, Hurd's Rev. Stat. 1881, p. 691; Indiana, Rev. Stat. 1881, secs. 6033-6045; Iowa, Rev. Code 1880, secs. 2147-2170; Kansas, Comp. L. 1879, secs. 3247-3367; Kentucky, Gen. Stat., p. 685; Maine, Rev. Stat. 1871, p. 329; Maryland, Rev. Code 1878, pe 286; Massachusetts, Gen. Stat. Ch. 55, sec. 2; Pub. Stat. 1882., p. 423; Michigan, 1 Comp. L. 1871, p. 50; Mississippi, Rev. Code 1871, secs. 1857-1880; Missouri, R. S. 1879, secs. 3401-3413; Nebraska, Comp. Stat. 1881, p. 368; New Jersey, Revision, p. 806; Nevada, 1 Comp. L. 1873, secs. 468-480; New York, 3 Rev. Stat., 2234; New Hampshire, Gen. Stat. 223; North Carolina, Battle's Rev. 1873, p. 568; Ohio, 1 Rev. Stat., secs. 3141-3161; Pennsylvania, 2 Brightley's Purd. Dig. 935; Oregon, Gen. Stat. 698; Rhode Island, Gen. Stat. 1872, p. 259; South Carolina, Gen. Stat. 1881, secs. 1289-1316; Tennessee, 1 Thomp. & S., secs. 1734-1757; Texas, Rev. Stats. 1879, p. 492; Vermont, R. L. 1880, secs. 3689-3699; Virginia, Code 1873, p. 989; West Virginia, 2 R. S. 1879, p. 343; Wisconsin, Rev. Stat. 1878, secs. 1703-1724.

[4] The States of Colorado, Illinois, Iowa and Oregon make no exceptions in the character of the business in which a limited partnership may engage.

ship shall be published for a specified period; 11, proof of which shall be made by affidavit of printer. 12. Upon each renewal beyond the period specified in the original certificate, a new certificate must be filed and recorded, and a new publication made. 13. Any alteration of the matter contained in the certificate will affect a dissolution of the partnership and render it general. 14. The firm name must be composed entirely of the names of general partners, without the addition of the words "and company," or any equivalent. The insertion of the name of a special partner will render him liable as a general partner. 15. Suits are to be brought in the name of and against the general partners, as if there were no special partners. 16. No sum can be withdrawn from the firm by the special partner, except interest and profits, when these can not be paid without the impairment of the capital, nor upon the insolvency of the concern, will he be allowed to claim the amount contributed as a creditor. 17. If the capital is so impaired, the special partner is required to make it good.[5] 18. The special partner may examine into the business, and advise as to its conduct, but he is excluded from active management;[6] 19, but he may demand an accounting as other partners.[7] 20. In a case of insolvency, special partners can not claim as creditors, until other creditors are satisfied. 21. Every sale or transfer of the property of such partnership, and every preference to a creditor, made when the concern is insolvent or in the contemplation of insolvency, is void.

Of course, the respective State statutes upon this subject are not exactly parallel with each other, nor in all cases with the above abstract of their provisions, but, nevertheless, it is believed that a fairly correct representation of the general results has been here given.

3. *Necessity for a Strict Compliance with the Requirements of the Statute.*—It is manifest, even upon a casual examination of these provisions that, collectively, they constitute an innovation upon the common law of partnership, by which the liability of a member of a firm for its undertakings might be restricted to the amount of capital contributed by him to the conduct of the business, upon the compliance on his part and that of his associates, with certain formalities in the nature of conditions. A failure in this respect is visited with the appropriate penalty of an unrestricted liability as a general partner. To the enumeration of these conditions, most of the sections of the statute are devoted; and it will be found that most, if not all, the decisions, which have arisen under it, are addressed to a determination of the question whether or not these conditions have been adequately fulfilled. It has been repeatedly held that inasmuch as these formalities are intended for the protection of the public, the requirements of the statute on this subject must be strictly complied with.[8] Any failure in this respect will render the special partner liable generally for all the firm's undertakings. It was so held in a Massachusetts case,[9] in which it appeared that while the certificate stated that the special partner had "contributed to the common stock an actual cash payment, as capital, of the sum of $5,000," he had in fact contributed in cash only the sum of $2,000, and $1,000 in an unindorsed note, payable to a third person, to which he had only an equitable title, and the remainder in his own notes payable to the general partner, by whom they were afterwards delivered to firm creditors, and by them were received as cash in part payment of their claims. The court held that this was not a sufficient compliance with the statute, and that the statement of the certificate was substantially false, and that the special partner was liable as a general partner. Says BIGELOW, C. J.: "A note is an agreement to pay money. It can not be treated as cash. It is quite immaterial that it does not appear that credit was given to the firm by the plaintiffs, or by other creditors, in consequence of the supposed payment by the alleged special partner of his proportion of the capital, and that it is not shown that loss or injury has been sustained by any one in consequence of

[5] Robinson v. McIntosh, 3 E. D. Sm. 221.

[6] If the special partner chooses to assume the consequences of a disregard of this prohibition, which is a complete liability as general partner, his power to bind the firm is the same, it would seem, as that of a general partner. Hogg v. Ellis, 8 How. Pr. 473.

[7] And this, it would seem, as well *after* as *before a dissolution*. Hogg v. Ellis, 8 How. Pr. 473.

[8] Holliday v. Union Bag Co., 3 Col. 342; Durant v. Abendroth, 9 Jones & Sp. 53; s. c., 69 N. Y. 148; Richardson v. Hogg, 38 Pa. St. 153; Andrews v. Schott, 10 Pa. St. 47.

[9] Pierce v. Bryant, 5 Allen, 91. See, too, Buckley v Bramhall, 24 How. Pr. 455.

the failure to comply with the requisitions of the law. Such evidence, from the very nature of the case, it would be very difficult to obtain. It was not intended by the provisions of the law that any such burden of proof should be thrown upon creditors. In the place of an inquiry into any such doubtful and speculative questions, the statute substitutes the plain, unequivocal and explicit provision, that if a false statement is made in the certificate, all the persons interested in the co-partnership shall be liable as general partners. For the same reason it is unnecessary to show any *mala fides* in making the certificate. Parties are bound to know the truth, and they can not be permitted to say that they acted in good faith, in certifying to that which was in fact false." [10]

The court further says: "It is a mistake to suppose that in adopting from the civil law the principle of a special or limited co-partnership, the legislature intended also to ingraft on the stock of the common law all the rules of construction which are applied to such a contract in those countries where it forms a part of the regular system of public laws. To have done so would have been to make a great inroad on the well settled doctrines of the common law applicable to partnership, especially on that fundamental rule that he who enters into a contract by which he is to contribute capital and share in the profits of a firm, shall be liable *in solido* for its debts. The intent of the statute is to relax this rule only on certain conditions, and within fixed and prescribed limits. If these are not fulfilled, or are disregarded, then the statute applies rigorously the rule of the common law, by subjecting all the members of the firm indiscriminately to the liabilities of general partners." [11]

4. *Exclusion of the Special Partner from Business Management*.—One of the principal requirements of the statute is the exclusion of the special partner from all active participation in the transactions of the concern. No sort of circumlocution will enable the special partner to avoid an actual and substantial compliance with this provision of the statute and still retain the advantage of a limited liability. Thus in a Pennsylvania case it was stipulated in the articles of limited partnership that a son of the special partner should keep the books of the concern at a specified place, and have a general supervision over the partnership, at a specified salary, and that the general partner should sign no note or check for firm money without the son's knowledge and approval. This excess of caution defeated its own purpose, for the court held in an action by one of the creditors against the special partner that the partnership was not limited but general, and that the special partner was liable for the firm debts.[12] For a special partner to hold himself out as a general partner and buy goods for his firm will render him liable as general partner, at any rate for all purchases made of such parties after the date of those representations.[13] And for him during the continuance of the co-partnership to buy out the entire firm property and continue the business in his own name, is to interfere with the firm business, and will render him liable as a general partner. This liability is not simply for liabilities incurred subsequently, but relates back and renders him liable as a general partner *ab initio*.[14]

5. *Certificate and Affidavit*.—The purpose of the certificate being to advise the public who may have occasion to deal with the firm of the facts contained in it, it follows that the truth of the statements therein made is an essential element without which there can be no limitation of the liability of the special partner.[15] The affidavit accompanying such certificate, however, need not follow the words of the statute. A statement that the special partner "has actually paid in" the capital contributed, is equivalent to one that he has paid it "in cash." [16] Where the certificate itself declared "that all the general partners interested therein are A & B, both of Brooklyn, in the State of New York, and that the special partner interested therein is C of Jersey City, in the State of New Jersey," it was held that this was a sufficient compliance with the requisite of the statute that the certificate should contain the respective places of

[10] Pierce v. Bryant, 5 Allen, 93.
[11] *Supra*.
[12] Richardson v. Hogg, 38 Pa. St. 153.
[13] Barrows v. Downs, 9 R. I. 446.
[14] First Nat. Bk. v. Whitney, 4 Lans. 34.
[15] Durant v. Abendroth, 9 Jones & Sp. 53; s. c., 69 N. Y. 148.
[16] Johnson v. McDonald, 2 Abb. Pr. 290.

the residence of the general and special partners.[17]

6. *Contribution of Special Partner to Capital.*—Where the certificate states that the contribution of the special partner to the capital of the concern has been paid in cash, nothing short of an actual cash payment will be regarded as a substantial agreement with the statement made; not a payment in bonds, though of such a character as to be generally regarded as the equivalent of cash, and though there was afterwards actually realized upon them for the benefit of the firm a sum greater than the amount of cash required;[18] nor in notes, though afterwards paid to the firm;[19] nor in a stock of goods;[20] nor in a check dated several days ahead of the time when the certificate was signed, though in fact paid on the day of its date, before the future day fixed by the certificate for the commencement of the partnership.[21]

If the special partner actually pays in the requisite amount of cash, with the intent that it shall abide the vicissitudes of the business, the validity of his position as special partner will not be affected by the fact that he procured the money from the general partner by the sale to him of a stock of goods at a price 25 to 50 per cent. greater than their actual value; that this was done with a view to the formation of the special partnership, and to enable him to contribute the required cash to the capital, will not render him liable as a general partner.[22] Nor where the special partner has paid his contribution in cash, will the misappropriation of it by the general partner, render him liable as a general partner.[23]

In the absence of a specific provision in the statute to that effect, there is no requirement that the special partner's contribution should be paid in cash. But if it is paid in property, the fact should be so stated in the certificate, and the cash value of the property given.[24]

17 Lachaise v. Marks, 4 E. D. Sm. 610.
18 Haggerty v. Foster, 103 Mass. 17. See also Van Ingen v. Whitman, 62 N. Y. 513.
19 Pierce v. Bryant, 5 Allen, 93.
20 Haviland v. Chace, 39 Barb. 283; Richardson v. Hogg, 38 Pa. St. 153; Vandike v. Rosskam, 67 Pa. St. 330.
21 Durant v. Abendroth, 9 Jones & Sp. 53; s. c., 69 N. Y. 148.
22 Lawrence v. Merrified, 10 Jones & Sp. 37.
23 Seibert v. Bakewell, 87 Pa. St. 506.
24 Holliday v. Union Bag Co., 3 Col. 342.

PROMISE TO MAKE A WILL—ROBERTS v. HALL.

The judgment of the Divisional Court of the Chancery Division, or rather of the learned chancellor, who delivered the principal judgment, is interesting among other things from its reference to a surprising *dictum* of the English Court of Appeal in Alderson v. Maddison,[1] where Baggallay, L. J., delivering the judgment of the court, says: "It appears to us that to give the same effect to a man's promise and agreement to make a will as to a will made by him in pursuance of such promise or agreement, would be in direct contravention of the provisions of the statute." In Roberts v. Hall, in the court of first instance, Ferguson, J., referred in his judgment to this *dictum*, without expressing either approval or disapproval of it, as, indeed, it was unnecessary to do, inasmuch as, in his view of the case the only agreement which he considered proved was contrary to public policy and illegal, and the court, therefore, could not under any circumstance recognize it. In the Divisional Court, however, Boyd, C., in the judgment noted in our last number, says: "The current of authorities enabling the court to give effect in a proper case to an agreement to dispose of by will, or to leave a man's property at his death, is too well established to justify giving effect to the *dictum* to the contrary in Alderson v. Maddison.[2]

In Roberts v. Hall, the parents of the plaintiff, in 1846, entered into a written agreement with one Hall and his wife, whose representatives the plaintiffs were, by which they agreed to give their daughter, the plaintiff, then six years old, to Hall and his wife, who were to adopt her as their own child, and to make her sole heir to their property. The evidence showed that the adoption took place, and the plaintiff thenceforward and always discharged all the duties devolving upon her in the new family to the entire satisfaction of the deceased; that all that a child could do for a parent was fulfilled by the plaintiff down to the death of both Hall and his wife. Thus all that was engaged to be done on the part of the plaintiff and her own

1 L. R., 7 Q. B. D 181.
2 *Supra.*

proper parents had been done. It also appeared that the adoption agreed upon between the parents of the plaintiffs and the Halls, was unquestionably calculated to advance the interests of the plaintiff. Under these circumstances the Divisional Court held the agreement was not illegal as against public policy, and being executed, so far as the plaintiff was concerned, the court could decree the performance of the rest of in *in specie*, although it could not have decreed specific performance while the agreement was executory on both sides. They therefore declared the plaintiff entitled to a declaration that the property, real and personal, of which the Halls died possessed, was impressed with a trust in the plaintiff's favor.

In Alderson v. Maddison, in the court of first instance,[3] the judgment of Stephens, J., amounts to a sort of treatise on the subject of representations and promises as to making a will. In that case the finding of the jury at the assizes had been that the defendant was induced to serve the father of the plaintiff, who claimed as heir at-law, as his housekeeper without wages for many years, and to give up other prospects of establishment in life by a promise made by him to her to make a will leaving her a life estate in a certain farm if, and when it became his property. Stephens, J., held that a contract to leave the plaintiff the life estate was established, and that there had been sufficient part performance on the part of the defendant to bar the Statute of Frauds, and gave judgment accordingly. The Court of Appeal[4] reversed this judgment on the ground that there had not been such a part performance as excluded the statute, but it did not, except as regards the *dictum* referred to in Roberts v. Hall express dissent from the general principles of law laid down by Stephens, J., in the court below in respect to representations and promises to make a will in a certain way.

Stephens, J., says that the law on the subject is clear and consistent when "all the decisions" are considered, and is to this effect. A mere representation which is not a term in a contract, nor yet an estoppel, is not binding. He says, "There is a class of representations which have no legal effect. There are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences unless the person making the representation not only excites an expectation that it will be fulfilled but legally binds himself to fulfil it; in which case he must, as it seems to me, contract to fulfil it." Thus, after reviewing such cases as Jorden v. Money,[5] Maunsell v. Hedges,[6] Caton v. Caton,[7] and Dashwood v. Jermyn,[8] in which representations, whether as to wills or other disposition of property, have been held not to be binding, he says: "All of these are cases in which the language used was considered to amount to nothing more than a declaration of what the parties influenced by it knew, or ought to have known, to be no more than a present revocable intention. Such declarations, no doubt, in many cases raised natural expectations which induced the parties to whom they were made to take irrevocable steps; but in such case the decision turned on the question whether the declaration was intended to form part of a contract or only to announce a present revocable intention, or (which is the same thing) to make a promise for which there was no consideration." On the other hand, after reviewing such well known cases as Hammersley v. De Biel,[9] Prole v. Soady,[10] Loffus v. Maw,[11] Coverdale v. Eastwood,[12] he says that the result he draws from them is that whenever representations have been held to be binding, the circumstances were such as to show that all the conditions of a valid contract had been fulfilled, and that in all the cases in which representations have been held not to be binding, one or more of these conditions were absent.

In our own courts, the cases on the subject of representations as to intentions of giving, devising or bequeathing, are entirely in ac-

[3] L. R., 5 Ex. D. 293 (1880).
[4] L. R., 7 Q. B. D. 174; s. c., 30 L. J. (N. S.) 466.
[5] 5 H. L. C., 185.
[6] 4 H. L. C., 1039.
[7] L. R., 2 H. L. 127.
[8] L. R., 12 Ch. D., 776.
[9] 12 Cl. & F. 45.
[10] 2 Giff. 1.
[11] 3 Giff. 592.
[12] L. R. 15 Eq. 121.

cordance with the view of the law thus set out by Stephen, J., in Alderson v. Maddison. Thus in McKay v. McKay,[13] where the plaintiff rested his case on a verbal promise to give land to him, Mowat, V. C., says: "A mere intention, though expressed, as to a future disposition of a man's property, creates no legal obligation upon him to carry out that intention; and until the intended gift is made, he may change his mind respecting it. But it is contended that there was more than an intention; that there was an agreement, and an agreement followed by possession." Again, in Fitzgerald v. Fitzgerald,[14] in which Spragge, C., discusses Hammersley v. De Biel, Jordan v. Money, Loffus v. Maw, and Maunsell v. Hedges, he says: "It can not, I think, be held to be the law of this court, that it will aid a party only in cases where the representation is in regard to existing facts; though that seems to have been the opinion of the majority of the law lords in Jordan v. Money. The case seems to have gone off upon another point. * * * * On the other hand, there may be a mere representation of intention. If such a representation be acted upon, it is acted upon in the expectation only of the continued good will of the party expressing such intention." He then quotes with approval, as does Stephens, J., in Alderson v. Maddison, the words of Lord Cranworth in Maunsell v. Hedges, where he says: "A representation may be so made as to constitute the ground of a contract. But is it so here? Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representations being true, and who do act upon it, equity will bind him by such representation, treating it as a contract." And, adds Spragge, C.: "This I take to be the law of this court. If a party engages to do a thing upon the faith of which another to whom it is communicated acts, it is treated as a contract, and is in fact a contract binding upon the party making it." And referring to the case before him, he says: "The question, then, in this case, I take to be, whether there was on the part of M F, the father, an inducement held out to his son, T, amounting to an engagement, that if he would leave Brampton, where he was then residing, and remove with his family to the place where he, the father, was living, he would, by his will, leave to him the north halves of the lots." So in Orr v. Orr,[15] Blake, V. C., after referring to Jordan v. Money, Maunsell v. White, Hammersley v. De Biel, Bold v. Hutchinson,[16] and Kay v. Crook,[17] says: "The deduction from these cases seems to be that where the representation is not of an existing fact, but of a mere intention, or where a promissor will not bind himself by a contract, but gives the other party to understand that he must rely solely on his honor for the fulfilment of his promise, the court will not enforce the performance of the representation or promise. A representation which amounts to a mere expression of intention must be distinguished from a representation which amounts to an engagement." In accordance with this is also Black v. Black.[18]

In such cases, therefore, the question would appear to be, (1) whether there has been such an expression of intention as amounts to a contract; (2) whether, if so, and if the intention expressed relates to a future gift or devise of land, there has been such a part performance, or such a memorandum in writing as takes the case out of the Statute of Frauds. What amounts to such a part performance as will take a case of this kind out of the Statute of Frauds, opens too wide a subject to be entered on here, but it may be observed that it is the main question which was dealt with by the Court of Appeal in Alderson v. Maddison, when that case came before it. As contended by counsel for the plaintiff in Roberts v. Hall, before the Divisional Court, there is nothing more contrary to the spirit of the Wills Act in an agreement to make a will, than there is contrary to the acts relating to conveyances in an agreement to make a deed.—*Canadian Law Journal.*

[13] 15 Gr. 371 (1868).
[14] 20 Gr. 410 (1873).
[15] 21 Gr., at p. 445.
[16] 3 Sm. & G. 407.
[17] 5 De G. M. & G. 558.
[18] 2 Er. & A. 419.

REMOVAL OF CAUSES—FAILURE TO FILE TRANSCRIPT— CITIZENSHIP— JURISDICTION.

NATIONAL STEAMSHIP CO. v. TUGMAN,

United States Supreme Court, October Term, 1882.

1. The individual members of a corporation, created by the laws of a foreign State, are, for purposes of suit by or against it in the courts in the Union, conclusively presumed to be citizens or subjects of such foreign State.

2. It is sufficient, in a suit in which the jurisdiction of a circuit court of the United States depends upon the character of the parties, if their citizenship is shown, affirmatively, by the record. Such citizenship need not necessarily be set out in the petition for the removal of the suit from the State court.

3. Upon the filing of the petition and bond required by the statute—the suit being removable—the jurisdiction of the State court absolutely ceases, and that of the circuit court immediately attaches, in advance of the filing in the latter of the transcript from the former. All orders thereafter made in the State court are *coram non judice*, unless its jurisdiction is in some form actually restored.

4. A failure to file the transcript within the time prescribed by the statute does not have the effect to restore the jurisdiction of the State court.

5. Whether, in the absence of a complete transcript, or when one has not been filed in proper time, the circuit court will retain jurisdiction, or dismiss or remand the suit to the State court, is for the former to determine.

6. After the filing of a petition and bond for the removal of a suit, pending in one of the courts of New York, and after that court had ruled that the suit was not removable, and that the cause should there proceed, the party seeking the removal consented to an order requiring the issues to be heard and determined by a referee, selected by the parties, and thenceforward contested the case as well before the referee as in the courts of the State up to final judgment: *Held*, that the jurisdiction of the State court was not thereby restored, and that the consent to the order of reference was to be deemed as only an expression of preference for that one of the several modes of trial authorized by the laws of the State. *Held*, also, that the objections interposed by the removing party to the exercise of jurisdiction by the referee and the State court, subsequent to the filing of the petition and bond added nothing to the legal strength of its position on the question of removal.

In error to the Supreme Court of the State of New York.

Mr. Justice HARLAN delivered the opinion of the court:

The underlying question in this case is whether, within the meaning of the Constitution and of the statutes determining the jurisdiction of the circuit courts of the United States, and regulating the removal of causes from State courts, a corporation created by the laws of a foreign State, may, for the purposes of suing and being sued in the courts of the Union, be treated as a "citizen" or "subject" of such foreign State?

In Ohio, etc. R. Co. v. Wheeler, 1 Black, 296, the court, speaking by Chief Justice Taney, said, that in the previous case of Louisville, etc. R. Co. v. Letson, 2 How. 497, it had been decided, upon full consideration, "that where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, or in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States." Marshall v. Baltimore, etc. R. Co., 16 How. 314; Covington Drawbridge Co. v. Shepherd, 20 How. 232; Ins. Co. v. Ritchie, 5 Wall. 542; Paul v. Virginia, 8 Wall. 178; Railroad Co. v. Harris, 12 Wall. 82.

To the rule thus established by numerous decisions the court adheres. Upon this branch of the case it is therefore only necessary to say that if the individual members of a corporation, created by the laws of one of the United States, are, for the purposes of suit by or against it in the courts of the Union, conclusively presumed to be citizens of the State by whose laws that corporation is created and exists, it would seem to follow, logically, that members of a corporation, created by the laws of a foreign State, should, for like purposes, be conclusively presumed to be citizens or subjects of such foreign State. Consequently, a corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State.

But it is suggested that the petition for the removal of the action into the circuit court of the United States is radically defective in that it does not show that the National Steamship Company was a corporation of a foreign State at the commencement of the action; that the allegation upon that point refers only to the time when the removal was sought. If, in suits in which the jurisdiction of the courts of the United States depends upon the character of the parties—it is material, under the act of March 3, 1875, to show what the citizenship of the parties was at the commencement of the action, it is sufficient to say that the averment in the original complaint, that the company is a foreign corporation, supplemented by the agreement in the petition for removal, that it is a corporation created by, and existing under, the laws of the United Kingdom of Great Britain and Ireland, covers the whole period from the commencement of the action to the application for removal. It is not always necessary that the citizenship of the parties be set out in the petition for removal. The requirements of the law are met if the citizenship of the parties to the controversy sought to be removed is shown affirmatively by the record of the case. Railway Co. v

Ramsay, 22 Wall. 322; Robertson v. Cease, 97 U S. 648.

The only remaining question which need be considered is whether the jurisdiction of the State court was, in form, restored, after the company filed its petition and bond for removal. The defendant in error insists that it was. The petition was accompanied by a bond which, it is conceded, conformed to the statute, and was ample as to security. Upon the filing, therefore, of the petition and bond—the suit being removable under the statute—the jurisdiction of the State court absolutely ceased, and that of the circuit court of the United States immediately attached. The duty of the State court was to proceed no further in the cause. Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored. It could not be restored by the mere failure of the company to file a transcript of the record in the circuit court of the United States within the time prescribed by the statute. The jurisdiction of the latter court attached, in advance of the filing of the transcript, from the moment it became the duty of the State court to accept the bond and proceed no further; and whether the circuit court of the United States should retain jurisdiction, or dismiss or remand the action because of the failure to file the necessary transcript, was for it, not the State court, to determine.

Nor was the jurisdiction of the State court restored when the company, subsequently, consented to the order requiring the issues to be heard and determined by a referee selected by the parties, or when it appeared and contested the case, as well before the referee, as in the State courts, up to final judgment. The right of the company to have a trial in the circuit court of the United States became fixed upon the filing of the petition and bond. But the inferior State court having ruled that the right of removal did not exist, and that it had jurisdiction to proceed, the company was not bound to desert the case, and leave the opposite party to take judgment by default. It was at liberty, its right to removal being ignored by the State court, to make defense in that tribunal in every mode recognized by the laws of the State, without forfeiting or impairing in the slightest degree its right to a trial in the court to which the action had been transferred, or without affecting, to any extent, the authority of the latter court to proceed. The consent, by the company, to a trial by referee was nothing more than an expression of its preference—being compelled to make defense in the State court—for that one of the several modes of trial permitted by the laws of the State. It is true that when the cause was taken up by the referee, as well as when heard in the Supreme Court of the State and in the court of appeals, the company protested that the circuit court of the United States alone had jurisdiction after the petition and bond for removal were filed. But no such protests were necessary, and they added nothing whatever to the legal strength of its position. When the State court adjudged that it had authority to proceed, the company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to maintain the right of removal, to protest, at subsequent stages of the trial, against its exercise of jurisdiction. Indeed, such a course would scarcely have been respectful to the State court after its ruling upon the point of jurisdiction had been made.

What we have said upon this subject is fully sustained by our former decisions, particularly Railroad Co. v. Koontz, 104 U. S. 5; Railroad Co. v. Mississippi, 102 U. S. 136; Kern v. Huidekoper, 103 U. S. 485 [13 Cent. L. J. 168, 292]; and Ins. Co. v. Dunn, 19 Wall. 214.

The judgments herein of the Court of Appeals of New York, and of the Supreme Court of New York are reversed, and the cause is remanded, with directions that the latter court accept the bond, tendered by plaintiff in error, for the removal of the cause to the Circuit Court of the United States for the Eastern District of that State, and to proceed no further in the cause.

CORPORATION—DISSOLUTION BY COURT OF EQUITY—RIGHTS OF STOCKHOLDER.

STRONG v. McCOGG.

Supreme Court of Wisconsin, October 31, 1882.

1. Independent of the statute, and at common law, a court of equity had no power to dissolve a corporation, and sell and divide its property, at the suit of an individual stockholder, in his own behalf and in his own name.

2. There is no statute in this State authorizing one of several stockholders to maintain a bill in equity in his own name, or in the name of the State, without leave being first granted therefor by this court, to dissolve a corporation, and convert its property into money, and then divide the same among a portion of the stockholders; and, in the absence of such a statute, such a suit cannot be maintained.

Appeal from Circuit Court, Lafayette County.

Moses M. Strong and *S. U. Pinney*, for respondent; *Orton & Osborn*, for appellant.

This is an action by the plaintiff as one of the stockholders of the Oakland Mining Company against that company and over twenty of its alleged stockholders, including appellant and James H. Earnest, for the purpose of determining the names of the stockholders, the number of shares owned by each upon the production of the certificates, and for judgment that the corporation had forfeited its corporate rights, privileges and franchises, and that the same be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved; that a receiver be appointed,

under whose direction the affairs of the corporation should be wound up, and its property, subject to the rights of lessees and their assigns, be sold and converted into money; that the proceeds, after the payment of costs, expenses and disbursements of the action and the receiver, be distributed as provided in section 3245 Rev. Stat. The complaint, among other things, alleged that the capital stock of the corporation was fixed at $3,000,000, and divided into 30,000 shares of $100 each, and that the plaintiff owned 12,480 shares, and the defendant, James H. Earnest, 4,340 shares, and the remainder of the stock was held by the other defendants. The appellant, among several others, was served by publication as non-residents of the State, and persons whose residence was unknown. On default being made, the cause was referred to Joseph H. Clary, December 10, 1879, who on the same day made his report to the court in writing, among other things, that the only persons who produced before him certificates of stock, or any other evidence that any of the capital stock was held and owned by such person, were the plaintiff and the defendant James H. Earnest, and that the plaintiff owned and held 12,480 shares, and James H. Earnest 4,340 shares. December 16, 1879, the court confirmed the report, and among other things, adjudged that the corporation, to-wit, the Oakland Mining Company, had, in pursuance of section 1763, Rev. Stat., surrendered the rights, privileges and franchises, granted or acquired under any law, and that the same be dissolved; that said corporation had forfeited all its corporate rights, privileges and franchises, and the same was thereby excluded from such corporate rights, privileges and franchises, and dissolved, and that the plaintiff recover of the corporation $149.55 for costs and disbursements; that the affairs of the corporation be wound up by and under the direction of the receiver thereby appointed for that purpose; that all the property, real and personal, of said corporation, be sold and converted into money; that out of the moneys arising from such sale, the receiver was to deduct his fees and expenses, and then pay the plaintiff his costs and disbursements, and then pay to the county clerk such sum as may be required to redeem the lands of the corporation from the sales thereof for taxes, and that after making such payment, he divide the surplus moneys, if any, into 16,820 equal parts, and thereupon pay over to the plaintiff, Moses M. Strong, 12,480 of such equal parts so divided, and to the defendant James H. Armstrong, 4,340 of such equal parts so divided, and to make his report of all his transactions as such receiver, and file it with the clerk of the court; that each and every one of the parties to the action who may be in possession of any of the lands so sold, should deliver such possession to the grantees named in the receiver's deed thereof, subject to the paramount rights of said Strong and Earnest, as thereby adjudged; that said corporation, and its successors and assigns, and the other defendants, and their heirs and assigns respectively, be forever barred and foreclosed of all right, title and interest in said lands, and of all equity of redemption therein. Thereupon the receiver advertised and sold the personal property of the corporation to Moses M. Strong for $84.10, and the real estate to said Strong for $4,006.55, making in all $4,090.65; that out of said sum he retained $44.60 for his fees and expenses as receiver; paid to the plaintiff $143.06 for his costs and his disbursements, and $1.293.02 to the county clerk to redeem the lands from taxes, and $86.97 to the town treasurer to pay the taxes, making $1,567.75, and leaving a balance in his hands of $2,523, which he divided between said Strong and Earnest as follows: To Moses M. Strong, $1,872; and to James H. Earnest, $651; all of which was reported by said receiver to the court, and which report was by the court confirmed March 23, 1880. From the judgment so entered December 16, 1879, the defendant E. P. McCogg, brings this appeal to this court.

CASSODAY, J., delivered the opinion of the court:

The question is not whether a court of equity has power to control and regulate the management of corporations, or protect or enforce the rights of stockholders, but whether a stockholder may, in his own name and without first obtaining leave of the court, maintain a bill in equity to dissolve and terminate a corporation, and convert its property into money and divide the same among a portion of its stockholders on the ground of non-user or misuser? It would seem that, independent of the statute, the general equity powers of the court do not extend to such a question. In the absence of a statute conferring jurisdiction upon courts of chancery, the question whether or not a corporation has violated its charter or forfeited its franchise, is a question for the sole determination of a court of law. Society v. Morriss Canal Co., 1 N. J. Eq. 157; Atty. Gen. v. Stevens, Id. 369; President, Managers, etc. v. Trenton City Bridge Co., 13 N. J. Eq. 57; State v. Merchants' Ins. & T. Co., 8 Humph. 235; Hodges v. N. E. Screw Co., 3 R. I. 9; Bayless v. Onre, 1 Freeman (Miss.), 161; Commonwealth v. Union Ins. Co., 5 Mass. 232; Folger v. Columbian Ins. Co., 99 Mass. 274. In State v. Merchants' Ins. & T. Co., *supra*, the court says: "By the common law, the forfeiture of a charter can be enforced in a court of law only, and the proceeding to repeal it is by a *scire facias*, or an information in the nature of a writ of *quo warranto*. A *scire facias* is the proper remedy where there is a legal, existing body capable of acting, but which had been guilty of an abuse of the power intrusted to it. A *quo warranto*, where there is a body corporate *de facto*, which takes upon itself to act as a body corporate, but from some defect in its constitution, it can not legally exercise the power it affects to use. But a court of chancery, unless specially empowered by statute, can not decree a forfeiture, though it may hold trustees of a corporation accountable for an abuse of trust." Page 252.

In Commonwealth v. Union Ins. Co., *supra*, Parsons, C. J., said: "But an information for the purpose of dissolving the corporation, or of seizing its franchises, can not be prosecuted but by the authority of the Commonwealth, to be exercised by the legislature, or by the attorney or solicitor general, acting under its direction, or *ex officio* in its behalf. For the Commonwealth may waive any condition, expressed or implied, on which the corporation was created, and we can not give judgment for the seizure, by the Commonwealth, of the franchises of any corporation, unless the Commonwealth be a party in interest to the suit, and those assenting to the judgment."

In Folger v. Columbian Ins. Co., *supra*, Mr. Justice Gray took occasion to say: "But general jurisdiction of writs against corporations no more implies a power to destroy a corporation at the suit of an individual, than jurisdiction of private suits against individuals authorizes the court to entertain a prosecution for crime, to pass sentence of death, and to issue a warrant for execution. The only modes of dissolving a corporation known to the common law, were, by the death of all its members; by act of the legislature; by a surrender of the charter, accepted by the government; or by forfeiture of the franchise, which could only take effect upon a judgment of a competent tribunal on a proceeding in behalf of the State; and neither a court of law nor a court of equity had jurisdiction to decree a forfeiture of the charter or dissolution of the corporation at the suit of an individual. Such, in effect, is conceded to be the rule at common law by several of the New York courts, notwithstanding, as said by the court in Bayles v. Orne, *supra*, in that State such "power is conferred by express statute." Slee v. Bloom, 5 Johns. Ch. 366; Verplank v. Mercantile Ins. Co., Edw. Ch. 84; Doyle v. Peerless P. Co., 44 Barb. 239; Gilman v. Green Point Sugar Co., 61 Barb. 9. It is true, the decision by Chancellor Kent in Slee v. Bloom, *supra*, was reversed by the court of errors in 19 Johns. 456. That last decision seems to be based upon the theory, to use the language of Chief Justice Spencer, that "incorporations under the statute differ from corporations to whom some exclusive or peculiar privileges are granted." He says: "There is nothing of an exclusive nature in the statute (authorizing the association of individuals for manufacturing purposes), but the benefits from associating and becoming incorporated, for the purposes held out in the act, are offered to all who will conform to its requisitions. There are no franchises or privileges which are not common to the whole community." Page 473. This is the view taken in Penniman v. Briggs, 1 Hopk. 303-4; s. c., 8 Cow. 387. The suit of Slee v. Bloom, 19 Johns. 456, was by a creditor to charge a stockholder, and went upon the theory that the corporation had been *ipso facto* dissolved.

The court in Bradt v. Benedict, 17 N. Y. 99, said: "Whether the court did not, by that decision (19 Johns. 456), rather supply what might be deemed a defect in the statute than to announce the law as it was to be found on the books, it is not necessary to inquire. * * * * But, in the language of Chancellor Kent, 'it should not be carried beyond the precise facts upon which the case rested.' In that opinion it is also conceded that as a general rule to constitute a dissolution of a corporation, by a surrender of its franchises or by misuser or non-user, the surrender must be accepted by the government or the default must be judicially ascertained and declared."

In Denike v. New York, etc., Co., 80 N. Y. 605, the non-user had not existed for a year, but the learned judge giving the opinion of the court, among other things, said: "A corporation owes its life to the sovereign power, and under what circumstances it shall forfeit or be deprived of that life depends upon the same power. * * * All the stockholders uniting might undoubtedly (under 2 R. S. 467) surrender the franchises of a corporation and work a dissolution. But can a portion of them do this in the absence of statutory authority? There is no statute in this State which authorizes a portion of the stockholders to maintain an action to dissolve a manufacturing corporation, and I know of no decision holding that they can." See also The King v. Ogden, 10 Barn. & C. 230; The Wallamet, 5 Sawy. 44.

From the authorities cited we feel warranted in holding that independent of the statute and at common law, a court of equity had no power to dissolve a corporation and sell and divide its property at the suit of an individual stockholder, in his own behalf and in his own name. Has the statute authorized such suit to be maintained? Such authority is claimed under section 1763, R. S., which reads: "Whenever any corporation shall have remained insolvent, or shall have neglected or refused to pay and discharge its notes or other evidences of debt, or shall have suspended its ordinary and lawful business for one whole year, it shall be deemed to have surrendered the rights, privileges, and franchises granted or acquired under any laws, and shall be adjudged to be dissolved." This section was taken from, and is substantially the same as sec. 20, ch. 148, R. S. 1858, and that in turn was taken from sec. 8, ch. 114, R. S. 1849. The section was originally borrowed from the statutes of New York, where "proceedings by and against corporations, and public bodies having certain corporative powers, and by and against officers representing them," were divided up into "proceedings by and against corporations in courts of law," to be commenced by summons, *scire facias*, or other process allowed by law, and "proceedings against corporations in equity;" and section 38 in question is found in the latter class. A similar division existed in the Revised Statutes of 1849, ch. 113, being "of proceedings by and against corporations in courts of law," and chapter 114 "of proceedings against corporations in chancery." Sec. 1 of this chapter 114, R. S. 1849, like the corresponding section (31) in New York, gave courts equity power

to restrain by injunction, etc., "upon a bill filed under the direction of the attorney-general." And section 3 of this chapter 114, R. S. 1849; sec. 15, ch. 148, R. S. 1858; sec. 3277 R. S., like the corresponding section (33) in New York, gave courts of equity jurisdiction over directors, managers, trustees, and other officers of corporations. And sec. 5, ch. 114, R. S. 1849; sec. 17, ch. 148, R. S. 1858; sec. 3239, R. S., like the corresponding section (35) in New York, provided that the jurisdiction conferred by the third section shall be received as in ordinary cases, on bill or petition, as the case may require, or as the court may direct, at the instance of the attorney-general prosecuting in behalf of the State, or at the instance of any creditor, director, trustee, or other officer, etc. And so section 6 of this chapter 114, R. S. 1849; sec. 18, ch. 48, R. S. 1858; sec. 3216 R. S., like the corresponding section (36) in New York, provided that "whenever a judgment at law or a decree in chancery shall be obtained against any corporation incorporated under the laws of this State, and an execution issued thereon shall have been returned unsatisfied, in whole or in part, upon the petition of the person obtaining such judgment or decree, or his representatives, the circuit court within the proper county may sequestrate the stock, property, things in action, and effects of such corporation, and may appoint a receiver of the same." So section 9 of this chapter 114, R. S. 1849; sec. 21, ch. 148, R. S. 1858; sec. 3218 R. S., like the corresponding section (39) in New York, authorized any court having equity jurisdiction to restrain moneyed corporations and their officers from exercising any of the corporate rights, privileges, or franchises, etc. So section 10, ch. 114, R. S. 1849; sec. 22, ch. 148, R. S. 1858; sec. 3219 R. S., like the corresponding section (40) in New York, provided that such injunction may be issued on the application of the attorney-general in behalf of the State, or of any creditor or stockholder upon bill or petition.

In Ward v. Sea Ins. Co., 7 Paige, 298, Chancellor Walworth said that he saw no reason why sec. 38 was introduced into the article relative to the proceedings against corporatiens in equity, unless it was intended to give the court of chancery jurisdiction to declare the corporation dissolved for any of the causes specified in that section. And he also said that, if there was any doubt about the power of the court to proceed under that section, there could be no doubt as to its proceeding under sec. 39, as the defendant was a moneyed corporation. Mickles v. Rochester Bank, 11 Paige, 118, was also against a moneyed corporation. No case has been cited where such suit has been maintained against any other than a moneyed corporation. Mr. Justice Earle, as late as 1880, in the quotation above given, states that no decision had then been made holding that such suit could be maintained "to dissolve a manufacturing corporation." It would appear, however, that two such suits were decided that same year, although they may have been under somewhat modified statutes. Medbury v. R. F. S. Co., 10 Hun, 498, and Kittridge v. Kellogg Bridge Co., 8 Abb. N. C. 168. The argument is that this sec. 38 of the New York statutes was adopted in Wisconsin with the construction which had been put upon it in that State.

The extent to which that construction had then gone, as we have seen, was that such suit could be maintained by a stockholder to wind up the affairs of a moneyed corporation. It may be insisted that the reason for maintaining the action would apply with equal force to other corporations. The question is not whether there was in the legislative mind any reason for any distinction between moneyed and other corporations, but did the statute make any distinction. The reference already made to secs. 39 and 40 show most clearly that the statute did make special provision for creditors or stockholders maintaining an injunction against moneyed corporations. If equity had jurisdiction to maintain a suit in behalf of a single stockholder against all corporations, then the special provisions as to moneyed corporations would seem to have been meaningless. But in our opinion sec. 38 did not of itself undertake to confer any new jurisdiction on courts of equity, nor designate in whose name suits should be brought, nor in any way regulate proceedings in such courts, but merely to define when corporations should "be deemed to have surrendered" "their rights, privileges and franchises." The jurisdiction of courts of equity to determine that question was not derived from that section, but from the other sections above referred to, with which it was connected, all under the general caption "Of Proceedings against Corporations in Equity." The section having been readopted in this State in 1849, with its connections and all, under the general caption "Of Proceedings against Corporations in Chancery," constituting chapter 114, Rev. St. 1849, there is much force in the argument that under the construction which it had received in New York prior to its adoption here, and while the statute remained, a stockholder could maintain a bill in equity in his own name to dissolve the corporation: at least, in so far as moneyed corporations were concerned. Assuming that such construction should have been given to chapter 114, R. S. 1849, it is urged with much plausibility that the same construction should continue, notwithstanding the section defining when corporations shall be deemed to have surrendered their rights, privileges and franchises, has, by the revision, been taken out of its connection with the other sections referred to, and is no longer under the caption "Of Proceedings against Corporations in Chancery." But being, as intimated, clearly of opinion that the section (1763 R. S.) never intended to give or confer any new jurisdiction on courts, nor designate in whose name suits should be brought, nor in any way regulate proceedings in court, we must find the authority for maintaining this suit by the plaintiff as a stock-

holder either in the statute at the time of bringing the suit, or by virtue of the general equity power of the courts as they existed at common law. Having already held that, independent of the statute and at common law, a court of equity had no power to dissolve a corporation, and sell and divide its property, at the suit of an individual stockholder, in his own behalf and his own name, it only remains to be ascertained whether the present revision of the statute does authorize such a suit to be maintained by a stockholder. Section 3239 R. S., provides that the jurisdiction conferred upon circuit courts over directors, managers, trustees, and other officers of corporations by sec. 3237 R. S., shall be exercised in an action prosecuted by the attorney-general in the name of the State, or by any creditor of such corporation, or by any director, trustee, or officer thereof having a general superintendence of its concerns, as the case may require, or as the court may direct. It is very clear that this is not such an action, and that the plaintiff does not sue as one of the persons there named. Section 3240 R. S., authorizes the attorney-general to bring actions in the name of the State for the purpose of vacating or annulling corporations. Section 3241 R. S., provides that an action may be brought by the attorney-general, or by any private party in the name of the State, on leave granted therefor by the Supreme Court upon cause shown, for the purpose of vacating the charter or annulling the existence of any corporation in the cases therein designated. Section 3242 R. S., provides, among other things, that in case the attorney-general, on application, shall refuse to bring such action, leave to bring the same by a private party shall be granted only on notice to the attorney-general and the proposed defendant. Section 3243 R. S., provides that in case of such application by the attorney general the court may in its discretion direct notice thereof to be given to the officers of the corporation. It is claimed by the learned counsel for the respondent that the case is excepted from the operation of these several sections by section 3250 R. S., which provides that "no special directions in these statutes, to the attorney-general or any other public officer, concerning corporations, not contained in this chapter, shall be deemed exclusive, nor shall anything in this chapter be deemed to repeal any other remedies given by these statutes to or against corporations, their officers, stockholders, or creditors."

It is true that section 1763 R. S., is not contained in this chapter, but another. It is also true that "any other remedies given by these statutes" are not to be deemed repealed by this chapter. But we are nowhere referred to any other remedy given by these statutes, for, as we have already suggested, section 1763, Rev. Stat., does not undertake to give a remedy, but merely to define what shall be a surrender or forfeiture. Counsel does not really contend that it does, but insists that the court has the inherent power, independent of the statutes, to apply the equitable remedies known to the common law. But we have already determined, upon the authority of many adjudged cases, that no such remedy existed at common law. If we are right in that, then it must follow that the only remedy is such as is given by statute, and manifestly the plaintiff has not pursued any of those remedies. The action is not brought by the attorney general, nor in the name of the State, nor by any private party on leave granted by the court. The question is important, and involves proceedings which may be resorted to for the purpose of taking away the corporate existence of a vast number of corporations. The unauthorized jurisdiction in such a case might be productive of great mischief. Were it admitted, as claimed by counsel, that the remedies given by statute are not exclusive, but merely cumulative, still the fact would remain that, according to the authorities cited, the plaintiff has chosen a remedy not given to courts of equity by the common law. Besides, it is to be remembered that the power of creating corporations by charter, which in England was an important prerogative of the Crown, and latterly practically exercised by parliament, in this country emanates from the legislative department of the government. In this State the right of alteration and repeal of every charter is expressly reserved to the legislature. Emanating from such a source, under such a reservation, it would seem upon principle that they should not be repealed or annulled by the court except upon the conditions named and in the manner prescribed by the law-making power. Section 1763, Rev. Stat., and other sections, have designated the conditions, and the other sections named have prescribed the different modes of procedure. Have courts the inherent power to dispense with the one any more than they have the other? If courts have the reserved equity power to repeal or annul charters, or dissolve corporations, in ways other than those prescribed by the statute, then why may they not do the same for crimes not mentioned in the statute? If there is reserved in courts of equity plenary power to proceed in methods not prescribed by the legislature, notwithstanding the statutes, then it is difficult to comprehend the purpose of providing methods which no one was obliged to follow. If it be claimed that the purpose of the statute was to prescribe new methods, then it may well be answered that those prescribed were in harmony with, or substitutes for, those which previously existed, while the one still claimed, but not prescribed, does not seem to have the sanction of courts of equity prior to the statutes. Certainly the prescribing of certain methods can not be regarded as authorizing other methods not prescribed. We therefore conclude that there is no statute in this State authorizing one of several stockholders to maintain a bill in equity in his own name, or in the name of the State, without leave being first granted therefor by this court, to dissolve a corporation and convert its property into money, and then divide the same among a

portion of the stockholders, and in the absence of such a statute, such a suit can not be maintained.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to dismiss the complaint.

CHARITABLE TRUSTS— STATUTE OF USES —SUCCESSION.

RECKWITH v. ST. PHILLIP'S CHURCH.

Supreme Court of Georgia, October 31, 1882.

1. A deed to one in trust to promote the cause of morals and religion in the land creates a charitable trust. So of all similar trusts for religions purposes.

2. Charitable trusts are not within the statute of uses. 27 Henry VIII.; Code, sec. 2313, 2314, 2315. So that when a charitable trust is created for the benefit of an unincorporated religious society, the title to the trust property will not vest in a subsequent corporation, claimed to include the beneficiaries. The original trustee or his proper successor as such would still hold the legal title.

3. The essential notion of a charity is that the property shall be kept away from temporary beneficiaries; and to preserve it for them for all time to come as they arise one after another.

4. By the statute of uses the trust is destroyed, so that if under that statute the creation of a corporation could divest the title of the trustee and vest it in such corporation the trust would cease and an absolute estate be enjoyed by the corporation.

5. Where, by deed, property was conveyed to Stephen Elliott, Jr., Bishop of the Protestant Episcopal Church in the diocese of Georgia, in trust for said church, the trust attached to the office and not to the person; and passed to the successor of said Elliott in the office of bishop, for the use of said church. And such was the evident intention of the donor.

Refusal of injunction from Fulton.

Harrison & Peeples, S. Hall and *Frank H. Miller*, for plaintiff in error; *E. N. Brayles, McCay* and *Abbott*, for defendants.

SPEER, J., delivered the opinion of the court.

On the 13th of April, 1847, Samuel Mitchell for and in consideration of his desire to promote the cause of morals and religion in the land, and one dollar paid, sold and conveyed a certain lot in the town of Atlanta, known as fraction block No. 1, containing three-fourths of an acre, to Stephen Elliott, Jr., of the P. E. church in the diocese of Georgia, to have and to hold the same as bishop aforesaid, for the use of said church in said diocese, in fee simple.

By deed, dated 10th June, 1847, L. P. Grant conveyed to Stephen Elliott, Jr., lots 33 and 34. Stephen Elliott, Jr., executed a disclaimer of the title of these last two lots, except as bishop of diocese of Georgia, in trust for use and benefit of the parish of St. Phillips in Atlanta, debarring his heirs, declaring the same to be rightfully vested in his successor or successors in office as bishop of the diocese of Georgia. This deed of disclaimer is not dated, but recorded November 8, 1866, in Fulton County.

A parish was organized in 1847, known by the name of St. Phillip's Church, the articles of association acknowledging and acceding to the doctrine, discipline, worship and the constitutions and canons of the Protestant Episcopal Church in the United States, and constitution and canons of the same church in the diocese of Georgia.

The diocese of Georgia was incorporated in May, 1877, by Chatham Superior Court, under the style of the "Protestant Episcopal Church of the Diocese of Georgia." Under the act of 1876, and in said charter, the bishop and standing committee and their associates, members of said church, were, with other powers, granted the right to hold real and personal property necessary for its organization, "including all property and right of property heretofore held by said church under its unincorporated organization."

On the 6th of October, 1881, a petition averring that a church had been established, was presented to Fulton Superior Court, and an order passed incorporating the rector, wardens and vestrymen of St. Phillips Parish, Atlanta, for twenty years, giving them authority, with other corporate rights, "to take possession of, hold and alienate any property, real or personal, that may be held in trust for said parish." On December 5, 1881 the rector, wardens and vestry resolved to mortgage the entire property for $15,000, and the bishop, as trustee, was requested to give his consent to the mortgage. This the bishop, on December 12, 1881, declined to do.

On Easter Monday, April 11, 1882, at a parish meeting for an election of the wardens and vestrymen of St. Phillips Church, "it was resolved to mortgage, for $10,000, all the property which belongs to the parish of St. Phillips." The complainant, as trustee under both deeds, on May 9th, 1882, filed this bill to prevent the realty passing under either deed from being so encumbered, as a cloud upon his title and endangering the trust estate.

The court below ruled that from the incorporation of the parish the title to the lot held in trust for the parish passed to the corporation, and that the bishop of the diocese, as trustee, had no such interest in the lot conveyed by Mitchell as authorized him to maintain the bill—retaining the injunction pending the writ of error only as to the lot conveyed by Mitchell.

The assignment of error on this judgment of the chancellor below are: 1st. In refusing the motion of complainant to strike the answer because not properly verified. 2nd. In holding and deciding that the incorporation of the rector, wardens and vestrymen of St. Philip's parish was and is an incorporation of the parish of St. Philip's. 3d. In holding and deciding that the incorporation of a parish would divest a trustee of title previously held by such trustee for the benefit and use of said parish. 4th. In holding and deciding

that the incorporation of the rector, wardens and vestrymen of St. Philip's parish divested the complainant of all title and interest in and to the lots described in exhibits B and C to complainant's bill, and that the said corporations upon their creation became invested with a perfect title to said lot. 5. In holding and deciding that complainant does not, as trustee or otherwise, hold the title to the lot described in exhibit A to complainant's bill,and that complainant did not,in reference to this lot, succeed as trustee his predecessor in the office of bishop of the Protestant Episcopal Church in the diocese of Georgia, and that complainant has no such interest in said lot as could enable him to maintain said bill. 6th. In refusing to grant the injunction prayed for. There is no issue as to the facts between these parties, and hence no review here as to abuse of discretion in the judgment of the chancellor below on the facts in refusing the injunction. But the questions presented are questions of law upon the facts admitted.

We deem it unnecessary to pass upon the three first grounds of error assigned in the record, as in our judgment a ruling on the other grounds embrace the main and controlling questions of law involved.

There are two deeds in this record conveying these lots. One by Samuel Mitchell conveying one of said lots to Stephen Elliott, Jr., bishop of the diocese of Georgia, for the use of the Protestant Episcopal Church,and the other by Stephen Elliott, Jr., conveying the other lots to the bishop of the diocese of Georgia, in trust for the use and benefit of the parish of St. Philips, in the City of Atlanta. These deeds originally vested the title of the lots in the grantees for the uses and benefits as stated.

The complainant below claims, as the successor of Bishop Elliott in the office of bishop, that he holds the title for the uses therein declared. The defendants in error claim that by the subsequent incorporation of the diocese and the parish of St. Philips the trusts became executed and the legal title held by the bishop united or merged into the use, and hence both legal and equitable title by operation of the statute of uses, known as the statute of 27, Henry VIII., passed to the trustees of said several corporations, to-wit: The diocese of Georgia, and the parish of St. Philips.

It certainly was the clear intent and purpose of the donor and grantor, in the creation of these trusts, to provide for and promote religious instruction and worship—the one in the diocese of Georgia and the other in the parish at St. Philips. When trusts are created for such a purpose, they are known and defined in law as "charitable trusts." The code defines a trust making provision for "religious instruction, or worship," a "charity" cognizable by a court of equity. Code, 3151.

Perry, in his work on trusts, says: "Charitable trusts include all gifts for religious or educational purposes, in their ever varying diversity." 2 Perry, sec. 687; 4 Ga. 404; 46 Ga. 88.

The rules of charitable trusts in their establishment and administration, are very different from those that are applicable to private trusts, in giving effect to the intention of the donor, and in establishing the charity. In a private trust, if the *cestuis que trust* are so uncertain, or are so incapable of taking, that they can not be identified, or can not, by legal or equitable proceedings, claim the benefit conferred on them, the gift will fail and revert to the donor and his heirs. But if a gift is made for a "public charitable purpose," it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain or indefinite. Still it will be sustained. A public charity begins where uncertainty in the recipient begins. Courts look with favor upon such trusts and take special care to enforce them—to guard them from assault and protect them from abuse.

"Charity in thought, speech and deed challenges the admiration and affection of mankind."

"Christianity teaches it as its crowning grace and glory, and the inspired apostle exhausts his eloquence by setting forth its beauty and the nothingness of all things without it."

The support and propogation of religion is clearly a charitabie use, and this includes gifts for the erection, maintenance and repair of church edifices, of worship, the support of the ministry, etc. 2 Pom. Eq., 587-8; Law of Trust (Tiffany and Bullard), 232, 236, 39, 40.

Where the general intention is "charity" the court will not permit mere matters of form to defeat it. 30 Pa. 437; 12 La. 301.

In charitable trusts the *cestuis que trust* or beneficiaries are not, and need not be capable of taking the legal title; and when property is given for the poor of a parish, or for the education of youth —for pious uses or any charitable purpose, the beneficiaries are generally unknown, uncertain and incapable of taking or dealing with the legal title; but such trusts are valid in equity, and courts of equity will administer them and protect the right of the beneficiary. 1 Perry on Trust, 66. An alienation of the legal title by the holder or trustee will be considered *per se* as a breach of his trust. It is his duty to preserve the trust property—act favorably to the trust interest, and if he sell the trust property, he must be prepared to show the transaction was beneficial to the charity, and in the absence of such proof, the sale will be treated as a breach of trust and be set aside. Law of Trusts (L and B) 274, and authorities there cited.

Are these charitable trusts subject to the statute of uses as declared in 27 Henry VIII? Or in other words, do such trusts ever become executed so as to merge the legal into the equitable estate under that statute? The intent of the statute of 27 Henry VIII was undoubtedly to do away wholly with the separation between the legal and beneficial ownership of lands, and to abolish uses and trusts altogether; but such a construction has not been fully carried out by the courts for various reasons.

Mr. Dwight, in his argument in the "Rose will case," says, speaking of charitable trusts or uses: "The very nature of the case precludes the idea that a statute could have been enacted with the intent to vest the title in the poor, or in children who were the beneficiaries of the charity. The essential nature of a charity is that the property shall be kept away from the temporary beneficiaries and to preserve it for them for all time to come, as they arrive one after another. Charitable uses are neither within the scope nor the words of the statute. The only design of the statute was to convert equitable into legal estates by annexing the legal title to the equitable right of possession; but the persons for whose benefit a charity is created have no estate or interest in the lands upon which the statute could possibly operate. They are mere beneficiaries, having the right, and nothing more than the right, to compel the performance of the trust according to its terms and the intention of the donor. A valid charitable use must always remain, and can only be enforced as a trust unaffected by the provisions of the statute. Since considering it simply as a use, there is not and never can be any person in whom it can be executed. As the rents and profits are to be applied to the benefit of a succession of persons in perpetuity, there is not, and can never be a *cestui que trust* to whom the legal estate, if that of the trustee is divested, can be given without destroying the charity and defeating for ever the intention of the founder." The very nature of this trust makes it a continuing executory trust. There is always something for the trustee to do, not only in protecting the title, but in ascertaining the objects of the trust, improving the property and determining the beneficiaries, who are uncertain and fluctuating. 4 Wheat. 646. It is conceded that there can be no merger of the legal and equitable estate so long as the trust is executory. Does the trust become executed by the creation of these corporations?

It can not be denied that under the statute of uses, when a trust becomes executed it is a destruction of the trust estate, because an actual estate is thereby created in the beneficiary as effectually as if done by conveyance and livery of seisin at common law. 2 Washburn, 415. Under this trust the trustee is charged with the duty of promoting the cause of religion and morals, and as it is continuing and perpetual, we can not see how it can be executed, and thus terminated, without doing violence to the intention of the donor. It is impracticable for this trust to be executed in the beneficiaries, for they are ever changing, by removals, accessions, deaths and births. Is it executed in these corporations as claimed by defendants in error—that is, is the complainant, as trustee, divested of the legal title in these lots by the creation of these corporations, and does this legal title merge or unite with the equitable estate in these corporations? The cases cited by the defendants in error in support of this proposition, in 4 Wend. 497; 3 Paige, 296; 2 Wash. (Va.) 35, and 5 Watts. & S. 323, all seem to rest on decisions made in New York, and upon a statute of that State. In that State, the statute of 27 Henry VIII, and 43 Elizabeth (known as the statute of charitable uses) were both repealed as early as 1788, and the State enacted in lieu thereof a statute that expressly provides "that property held in trust for an unincorporated religious society would vest in an incorporation of such society." This New York statute declares "that the trustees of a church are authorized and empowered to take into their possession and custody all the temporalities belonging to such church congregation or society, whether the same consists of real or personal estate, and whether the same shall have been given, granted or devised, directly to such church congregation or society, or to any other person for their use. Rev. Stat. (N. Y.) 3d vol. 292. In Georgia the only statute of uses in force is that of 27 Henry VIII, as found embodied in sections 2313, 2314, 2315 of the Code.

So far as our investigation has extended, we can find no case where it has been held, under the English statute of uses, a charitable trust, such as this, continuing and perpetual, would be terminated by creating a corporation embracing the beneficiaries. On the other hand, in the case of Methodist Society of Georgetown v. Bennett, 39 Conn. 293: "Where land was conveyed to certain trustees in trust for the members of the Methodist P. church of G., to be holden by them and their successors in office for ever, for the proper use and behoof of said church, agreeably to the Methodist P. church discipline, and the book of discipline provided for the election of trustees to each church, and made it their duty to hold the property of the individual churches in trust for the use and benefit of the members thereof, with power, when authorized by two-thirds of the male members over twenty-one years of age, to dispose of property so held, but on no other condition. It was held that the legal title did not vest in the church as a corporation.

If this legal title in the complainant is by the statute of uses merged in the equitable or beneficial estate and both unite and form but one estate, then these corporations would hold this property free from any trust; for wherever this merger takes place the equitable or beneficial estate ceases, and the title is in the corporation unincumbered with the trust. For, as before stated, when, under the statute of uses, a trust becomes executed by the merger of the legal with equitable estate," an actual estate is thereby created in the beneficiary as effectively as if done by conveyance with livery of seisin at common law. 2 Wash. 415. If this trust is executed by the creation of these corporations, and they take both the legal as well as the equitable title. then their actual estate is absolute, the trust is terminated, and the intention of the donor is defeated. But it is said the perfect title would vest in these corporations "according to the terms and limitations of the trust." Code, sec. 2314. The meaning of this is they would take

first such a legal estate as the beneficiaries had and held as an equitable estate, and as their equitable estate was designed (in these deeds) to be perpetual, so would the legal estate be perpetual and the trust would no longer exist.

The English statute of uses—27th Henry VIII—was enacted in hostility to trust estates. Its purpose was to destroy and put an end to such estates and vest the title, both legal and equitable, in the beneficiary of the trust, and thus create in him an actual estate free of the trust, and if this trust is executed as claimed by these corporations coming into existence, they take the actual, absolute title disencumbered of any trust. To claim they would hold as trustees for the beneficiaries subject to the uses and terms of the deeds from the donors, would not be in conformity with either the letter or the spirit of the statute of uses, as applied to executed trusts. Code, sec. 2314. In 2 Michigan Reports, 113, the court decided that the creation of a corporation after the conveyance of the land in trust would not permit the corporate officers to manage the corporate property contrary to the laws and usages of the church. In Calkins v. Cheney, 72 Ill. 462, the court stated, "most obviously, property held in trust for the benefit of a religious denomination can not be held subject to be conveyed away or improved or used in accordance with the dictates of a society or congregation." In Watts and S. R. 25, it was held "an act of incorporation after the deed of trust is always with respect to this grant to be construed consistently with the deed, and the congregation must enjoy the land granted in subordination to the uses described in the deed." "The charter can not change the effect of the grant in any particular. The grant is a contract, the obligation of which can not be impaired by any authority." 4 Wheat. 15; 4 Id. 518, 624. But whether the title to these lots is in the trustee or the corporation it is still a trust. Section 2335 of the Code declares "trustees are not authorized to create any lien on the trust estate except such as are given by law." In Iverson v. Saulsbury, decided at the February term, 1882, not yet reported, a majority of this court held that after full notice to all parties a chancellor could not, in vacation, authorize a trustee to encumber the trust estate by mortgage."

Was there error in the court holding, as complained of in the 5th assignment of error "that the lot conveyed to Stephen Elliott, Jr., bishop, in trust for the Protestant Episcopal Church in the diocese of Grorgia, was a trust attaching to the person and not to the office of bishop, and that the trust did not pass to his successor in office?

In Georgia the courts apply liberal rules of construction to carry out the intention of the donor. 4 Ga. 404; 25 Id. 420. A bond payable to Gilmer, governor, and his successors in office is payable to the officer and not the individual. 15 Ga. 423. So if only payable to the governor. 1 Ga. 583. So by the terms of or a close analogy with sec. 2343 of the Code this trust would vest in the present complainant as the successor. This was evidently the intention of the donor. The trust was lodged for the benefit of a diocese in its bishop, its highest officer, and who by the rules of his church government was the regular successor of a long line of officials preceding him. No other provision was made by the deed for any other succession, and the conclusion is reasonable he intended this trust to pass to the successors in office of the first trustee.

We conclude, therefore, that the complainant, to whose predecessor these conveyances were executed, is not divested of his legal title to these lots of land by the corporation of the "Diocese of Georgia" and "the parish of St. Philip's church" under the "statute of uses," as of force in this State, and that without his consent there could be no lien or mortgage created on this trust property, and that the chancellor below erred in not granting the injunction as prayed for.

Judgment reversed.

Jackson, Chief Justice, *dubitante*.

WEEKLY DIGEST OF RECENT CASES.

1. ADMIRALTY—COLLISION—CROSS-ACTIONS—CONSOLIDATION

1. In cases of collision of vessels, where both parties are in fault, the martime rule is to divide the entire damage equally between them, and to make a decree for half the difference between their respective losses in favor of the one that suffered most, so as to equalize the burden. 2. At all events, if both parties file libels, the courts of the United States have the power to consolidate the actions, and prescribe one proceeding and pronounce one decree; which decree will be for one-half of the difference of damage suffered by the two vessels, as before stated. 3. The statute of limited liability is not to be applied in such a case until the balance of damage has been struck; and then the party against whom the decree passes may have the benefit of the statute—if he is otherwise entitled to it—in respect of the balance which he is decreed to pay. *Reynolds v. Vanderbilt*, U. S. S. C., November 6, 1882; 5 Morr. Trans., 48.

2. ADMIRALTY — COLLISION — PRACTICE WHERE BOTH ARE IN FAULT.

Where a vessel-owner libels for and recovers damages against a tug and tow for collision, both being in fault, the proper form of decree is, that the owner of the injured vessel should recover half of the damage against each offending vessel, with the right to enforce any balance of such half which can not be enforced against one vessel against the other vessel. *Ship Sterling v. Peter-*

sen, U. S. S. C., November 6, 1882, 5 Morr. Trans., 76.

3. ARBITRATION—NEGLECT TO SWEAR WITNESS.

This is a suit on an award, made by arbitrators, in pursuance of a written submission of all the matters in controversy between plaintiff and defendant arising out of a co-partnership which had existed between them, and which defendant had refused to perform. None of the witnesses who testified before the arbitrators were sworn. *Held*, that the arbitators having failed to require witnesses to testify under oath, and the necessity of an oath not having been waived by the defendant, the award is a nullity, and no action can be maintained upon it. *Wolff v. Hyatt*, S. C. Mo.

4. ATTORNEY AND CLIENT—AUTHORITY OF SOLICITOR—FRAUDULENT DEFENSE.

The authority of a solicitor in an action does not extend to putting in a fraudulent defense. If a solicitor, having authority to defend an action, deliver a fraudulent defense (without the knowledge of his client), containing admissions on which the plaintiff obtains judgment, the court will, on proof of the fraud (although the plaintiff was no party to it), set aside the judgment, and give leave to the client to withdraw the fraudulent defense, deliver a fresh defense, and adduce evidence in support of his case; and the proper mode of obtaining relief is to move the Court of Appeal, on notice to the plaintiff. *Williams v. Preston*, Eng, Ct. App., 47 L. T., 265.

ATTORNEY AND CLIENT—QUALIFICATIONS OF ATTORNEY—IMPLICATION BY ACCEPTANCE OF RETAINER.

1. An attorney-at-law of the State of New York, employed there to draw a contract for building on lands in New Jersey, does not, by accepting such employment, impliedly undertake that he is acquainted with the laws of this State respecting the necessity of filing of such contracts for protection against claims of workmen and material men under the mechanics' lien law. 2. An attorney-at-law who accepts an employment to draw such a contract, does not thereby impliedly undertake to file it. In the absence of an express undertaking to file it, he will not be liable for failure so to do. *Quære*, whether, when so employed, he would be liable for failing to advise his client of the risk of not filing such a contract. 3. Even if liable for breach of duty in respect to filing such a contract, the owners, who have been required to pay a subcontractor's claim, can not recover of the attorney if they have discharged the builder, who is primarily liable, or have accepted satisfaction from him. *Fenaille v. Condert*, S. C. N. J., Reporter's Advance Sheets; 44 N. J. L., 286.

6. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACT — IRREGULAR CONTRACT SUBSEQUENTLY VALIDATED.

1. The obligation of a contract which, when made, was unenforceable by reason of some irregularity, but which has been validated by reason of a subsequent law, is protected by the Constitution to the same extent as if the contract had been strictly legal at first. 2. The obligation of such a contract includes the remedies which would have been available for its enforcement if it had been valid when made, or such other remedies as may have been lawfully substituted therefor. *State ex rel. v. Town of Union*, S. C. N. J., Reporter's Advance Sheets; 44 N. J. L., 259.

7. CONVEYANCES — COVENANT OF GRANTEE — ACCEPTANCE OF DEED.

1. The grantee in a deed, by accepting the same, becomes liable on the covenants therein purporting to be made by him, just as if he had signed and sealed the instrument. 2. A covenant by the grantee in a deed to assume a mortgage, for payment of which the grantor is personally liable, binds the grantee to pay the mortgage debt. 3. In an action for breach of the defendant's covenant to pay a debt which the plaintiff owes, the damages recoverable are the full amount of the debt, although the plaintiff may not yet have paid the same. *Sparkman v. Gove*, S. C. N. J., Reporter's Advance Sheets; 44 N. J. L., 253.

8. CORPORATION — SPECIAL STATUTE OF LIMITATIONS.

1. The clause in the charter of the defendant exempting it from suit after the lapse of a year from the accrual of the cause of action, was not repealed by the re-enactment in the revision of the act relating to the limitation of actions. 2. It is not necessary, on constitutional grounds, that the title of a charter of a railroad company, which charter contains a clause limiting the time for bringing suits against it, should refer to such provision. *Vail v. Easton, etc. R. Co.*, S. C. N. J., Reporter's Advance Sheets; 44 N. J. L., 237.

9. EVIDENCE—ADMISSION OF PART OWNER OF A VESSEL.

The admissions of a part owner of a vessel are not evidence against his co-owners, the relationship being a tenancy in common, not a partnership. *Clark v. Weeks*, U. S. S. C., Nov. 6, 1882; 5 Morr. Trans., 88.

10. FEDERAL COURTS — APPEAL — JURISDICTIONAL AMOUNT.

1. A suit to enjoin two decrees obtained by different parties, entirely distinct from each other, and each involving less than $5,000, is not reviewable in this court. 2. The mere fact that a Federal question is involved is not sufficient to give this court jurisdiction in appeals from the Federal, Circuit or District Courts. Even in such cases the sum of $5,000 must be involved in order to give jurisdiction. *Adams v. Crittenden*, U. S. S. C., Nov. 6, 1882; 5 Morr. Trans., 77.

11. FEDERAL COURTS — APPEAL — JURISDICTIONAL AMOUNT.

Where the owner of a vessel and the owner of the cargo join in a libel for collision, and obtain a decree giving each less than $5,000, but both combined more than $5,000, an appeal will not lie to this court from such decree, the interests being several and not joint. *In re Baltimore, etc. R. Co.*, U. S. S. C., Oct. 30, 1882; 5 Morr. Trans., 45.

12. INTERNAL REVENUE— CAPITAL STOCK OF RAILROAD.

A corporation issued to its stockholders a certificate reciting that the corporation had "hitherto expended of its earnings in various ways to increase its traffic a sum equal to eighty per cent. of its capital stock," and made it a dividend-bearing stock: *Held*, that under section 122 of the Internal Revenue Act of 1864 (13 Stat. at Large, 284), only that part of the earnings included in the certificate was taxable which had accrued subsequent to the passage of the act; and that it was competent to the corporation to show what portion of such earnings had accrued since the passage of the act; and that in such case the face value of the certificates was not conclusive as to the amount taxable

Bailey v. New York, etc. R. Co., U. S. S. C., November 6, 1882; 5 Morr.Trans., 62.

13. LANDLORD AND TENANT—"IGNORANTIA LEGIS NEMINEM EXCUSAT."

1. The maxim *ignorantia legis neminem excusat* is not universally applicable, but only when damages have been inflicted or crimes committed. 2. B, a tenant, owing rent, agreed, for a sufficient consideration, to pay it to A provided he should not be compelled to pay it to the assignee in bankruptcy of his landlord, to whom such rent was really due, but B was in doubt as to his legal right. *Held*, that such contract was legal and enforceable. *Brock v. Weiss*, S. C. N. J., Reporters' Advance Sheets; 44 N. J. L., 241.

14. LIBEL—CORPORATION—PREVIOUS AND SUBSEQUENT PUBLICATION.

1. An action for libel can be maintained against a corporation. 2. Previous or subsequent publications are admissible in evidence for the purpose of showing the temper of the defendant's mind in the publication complained of, and it makes no difference that such publication is one, by reason of the bar of the statute of limitations, upon which no action can be maintained. 3. If the previous or subsequent publication be a privileged one, it will be no evidence of malice, and consequently will have no weight whatever. *Evening Journal Ass'n. v. McDermott*, N. J. Ct. of Err. and App., Reporters' Advance Sheets; 44 N. J. L., 430.

15. PARTNERSHIP—POWERS OF PARTNERS—GUARANTY.

Mere partnership relation does not authorize a partner to guaranty the obligation of a third person. If any such authority is claimed to exist, it is for the claimant to prove it affirmatively. It can not be established by any act (alone) of the partner who assumed to execute the alleged guaranty. *Osborne v. Carr*, S. C. Minn., November 20, 1882; 13 N. W. Rep., 922.

16. PATENT — LICENSE TO USE ONCE ONLY — INFRINGEMENT.

1. The plaintiffs were the owners of patents for improvements in metalic cotton-bale ties, each tie consisting of a buckle and a band. They granted no licenses to make the ties, but themselves made them and supplied the market. They stamped in the metal of the buckle the words, "licensed to use once only." The defendants bought as scrap iron the buckles and bands at the cotton mills, after the bands had been severed to release the bale, and rolled and straightened the pieces of the bands, and riveted together their ends, and cut them into proper lengths for ties, and sold them, with the buckles, to be used as ties, nothing being done to the buckles. *Held*, that the defendants had infringed the patents. 2. It was not decided that they were liable as infringers merely because they had sold the buckle considered apart from the band or from the entire structure as a tie. *Cotton-Tie Company v. Simmons*, U. S. S. C., Nov. 6, 1882; 5 Morr. Trans., 81.

17 PENSION—EXEMPTION OF PROCEEDS FROM JUDICIAL PROCESS.

Money due for pensions, while it remains in the hands of the disbursing officer or agent for distribution, or while in course of transmission to the pensioner, is not liable to be seized by creditors under any legal process. After it has come to his hands it is so liable, like any other funds of the debtor. *State v. Fairton Sav. Fund, etc. Ass'n*, S. C. N. J., Reporter's Advance Sheets; 44 N. J. L., 376.

18. REAL PROPERTY—BUILDING ERECTED ON LAND OF ANOTHER—INJUNCTION.

In this case, a perpetual injunction was decreed, restraining defendant from removing from plaintiff's lot, in the town of Boonville, a portion of a building used by defendant as a freight depot, and which had been erected thereon by defendant. Upon a full review of the evidence, the Supreme Court hold that defendant is the owner of the lot, and that the building was placed there without her consent. *Held*, "that in respect to property in buildings erected by one man on the land of another, if the building is erected without the assent and agreement of the land owner, it becomes a part of the realty and is the property of the freeholder. But it seems if a building is erected on the land of another under a parol contract of purchase, and there is a failure to acquire title through no fault of the vendee, the building so erected may be removed by him." *Hunt v. Missouri Pac. R. Co.*, S. C. Mo.

19. REAL PROPERTY—RIPARIAN RIGHTS.

1. A person owning land abutting on a river through which a creek flows and empties into the river, may, as against proprietors on the opposite side of the river, change the channel and mouth of the creek upon his own land and for his own protection or convenience, if, in so doing, both in the inception and execution of the work, he exercises reasonable care and caution not to injure the rights of others. 2. If, however, the opposite bank of the river be subject to inundation and overflow in case of unusual but not unprecedented floods in the river, such change in the channel and mouth of the creek can not be rightfully made, if, thereby, in the exercise of ordinary prudence and foresight, increased danger of inundation and overflow on the opposite side of the river might be anticipated. 3. When such change is made without fault or carelessness, and a levee on the opposite bank is broken and washed away by an unusual, but not unprecedented flood, whereby the crops growing on adjacent lands are destroyed, it is *damnum sine injuria*, notwithstanding a sandbar in the river at the new mouth of the creek, caused by the change in the creek, may have contributed, in some degree to the damage. *Cincinnati, etc. R. Co. v. Carr*, S. C. Ohio; 8 Weekly Cin. L. Bul., 273.

20. REAL PROPERTY—SALE UNDER CONFISCATION ACT—INTERVENTION OF INCUMBRANCER.

Under proceedings by the United States to confiscate real estate under the act of July 17, 1862, in which the land is sold and the proceeds paid over to an incumbrancer who had intervened in the confiscation proceedings, but who had taken no other steps to foreclose his mortgage, the only effect of a sale under such proceedings was to vest in the purchaser an estate during the life of the owner free of the lien of the mortgage; and such purchaser was not subrogated to the rights of the mortgagee in such case, such payment to the mortgagee being a *pro tanto* payment of the mortgage. *Waples v. Hays*, U. S. S. C., November 6, 1882; 5 Morr. Trans., 73.

21. REMOVAL OF CAUSES—CITIZENSHIP OF FORMAL PARTIES.

1. An attachment suit brought against a party by non-residents, in which his interest in his father's estate is attached, is removable into the Federal courts, even though the executors of the father's

estate are citizens of the same State as the complainants—such executors being mere garnishees and not interested in the main controversy. *Bacon v. Rives*, U. S. S. C., October 23, 1882; 5 Morr. Trans., 35.

22. SHERIFF'S SALE — ARRANGEMENT THAT SALE SHOULD BE FOR BENEFIT OF DEFENDANT.

The mere fact of an arrangement between the purchaser and the defendant in the execution, that the sale should be for the benefit and advantage of the latter, does not of itself make the sale absolutely void. It would be voidable by any creditor defrauded, but was good as between the parties to the arrangement. *Pentz v. Clark*, S. C. Pa., October 2, 1882; 39 Leg. Int., 441.

23. STATUTE OF LIMITATIONS BEGINS TO RUN IN FAVOR OF TRUSTEE.

1. Unless otherwise declared by statute, the cause of action is not ordinarily deemed to have accrued against, nor limitation to commence running in favor of, the trustee of an express trust until the trust is closed, or until the trustee, with the knowledge of the *cestuis que trust*, disavows the trust, or holds adversely to the claim of those he represented. 2. Hence, where money was remitted to an agent for investment, and he, during a term of years, had made no report of his transactions, nor disclaimed the trust in any way, he can not, by setting up that the claim is barred by the statute of limitations, avoid a discovery of his acts and doings under the trust. *Bacon v. Rives*, U. S. S. C., October 23, 1882; 5 Morr. Trans. 3 .

RECENT LEGAL LITERATURE.

PROCEEDINGS IN REM. A Treatise on Proceedings in Rem. By Rufus Waples. Chicago, 1882: Callaghan & Co.

There is a suspicion abroad in the profession that many of the law books which nowadays are from time to time issued from the press are, to put it mildly, superfluous; that they cover ground already sufficiently occupied by the works of standard writers, and that, in many instances, they are really but a rehash of the contents of the older volumes, without being an improvement upon them.

The volume before us is open to no such cavil. It is a new work and occupies a hitherto unexplored field. Its method is thoroughly scientific and systematic, dealing with the principle which underlies the adjudications, rather than the cases themselves as individual instances, and, consequently, it is justly entitled to the name of treatise, which frequently is unwarrantedly assumed by works which should be more properly termed digests. Things, the object of actions *in rem*, are divided into three classes: 1. Things guilty; 2. Things hostile, and 3. Things indebted. To each of these, after discussing in the first book actions *in rem* in their general aspects, is one of the three remaining books devoted.

Under the first head are considered cases of forfeiture, arising out of violations of revenue and navigation laws, etc.; for piracy, slave-trading, etc.; for obscene and immoral uses, and for non-payment of taxes. Under the second are found cases of confiscation, and arising under the prize laws, etc. Under the third head are discussed admiralty liens, probate and attachment proceedings and proceedings *quasi in rem*.

NOTES.

——Lord Lyndhurst, when common law judge, always tended to the side of mercy. He aided an inexperienced advocate, and would see that a client did not suffer through any deficiencies of counsel. After he became chancellor, describing the principles upon which he selected a judge, he said: "I look out for a gentleman, and if he knows a little law, so much the better."——The celebrated Justice Maule was once the subject of a savage onslaught from Fonblanque of the Examiner. When the matter was mentioned to him, he merely said: "Well, I can't understand it; I never did him a favor."——Justice Williams was familiarly called Johnny, except when addressed as "my lord." His clerk, recently married, hanged himself. The next clerk soon after entering his employment, expressed the hope that Johnny would not be offended at his marrying. "Certainly not; marry by all means; but when you hang yourself, do not do so in my chambers," which his former clerk had done.

——It is related of Mr. Justice Gray of the United States Supreme Court, that upon one occasion, when on the Massachusetts supreme bench, after a long speech from a verbose attorney, notwithstanding he had stated no further argument was necessary, he said: "Mr. ——, the court is still with you."

——The constant publication of cases in support of clear law is excessively tiresome, and irresistibly calls to mind the amusing colloquy in "Much Ado about Nothing:" *Don Pedro.*—I think this is your daughter. *Leonato.*— Her mother hath many times told me so. *Benedick.*—Were you in doubt, sir, that you asked her so often?

——Lord Erskine, while going circuit, was asked by the landlord of his hotel how he had slept. He replied dogmatically: "Union is strength, a fact of which some of your inmates appear to be unaware; for had they been unanimous last night they could easily have pushed me out of bed." "Fleas?" the landlord exclaimed, affecting great astonishment; "I was not aware that I had a single flea in my house." "I don't believe you have," retorted his lordship; "they are all married, I think, and have uncommonly large families."